Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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VOLUME 6 • NUMBER 15 • JULY 20, 1994

Offense Conduct

CALCULATING WEIGHT OF DRUGS—MIXTURES

U.S. v. Boot, No. 93-2317 (1st Cir. June 7, 1994) (Cyr, J.) (Affirmed: Nov. 1993 amendment to § 2D1.1(c) that changed method of calculating weight of LSD controls for guideline calculations, but for mandatory minimum sentences the calculation is still controlled by the holding in *Chapman v. U.S.*, 500 U.S. 453, 468 (1991), that the weight of the carrier medium is included. Therefore, defendant resentenced under § 1B1.10(a) could not have his sentence reduced below the applicable five-year mandatory minimum, based on the weight of the LSD plus the carrier medium, even though his guideline range was reduced from 121–151 months to 27–33 months.). *Cf. U.S. v. Mueller*, No. 93-1481 (10th Cir. June 22, 1994) (Moore, J.) (Affirmed: Defendant, originally sentenced to five-year mandatory minimum that was later reduced to 39 months after Fed. R. Crim. P. 35(b) departure, was not entitled to resentencing under amended LSD calculation in § 2D1.1(c). Under § 1B1.10(b), the district court "should consider the sentence that it would have originally imposed had the guidelines, *as amended*, been in effect at that time." Here, even though amended § 2D1.1(c) would result in a range of 18–24 months, defendant was still subject to five-year minimum term, and the "subsequent reduction upon the government's Rule 35 motion, which occurred at a later date, has no concomitant retrospective applicability.").
Outline at II.A.3 and II.B.1.

U.S. v. Telman, No. 93-3324 (10th Cir. June 30, 1994) (Baldock, J.) (Affirmed: Defendant pled guilty to an LSD offense and, following a § 5K1.1 motion by the government, had his offense level reduced from 29 to 15 and was sentenced below the five-year statutory minimum to 18 months. Following § 1B1.10(a), he later sought resentencing under the Nov. 1993 amendment on calculating weight of LSD in § 2D1.1(c), claiming that his offense level would be 15 following the amended guideline, that the district court would have departed downward from level 15 instead of ending there, and that his sentence would therefore be lower. The district court denied the motion and was affirmed. "[I]t is apparent from the language of 1B1.10(a)—*i.e.*, 'may consider'—that a reduction is not mandatory but is instead committed to the sound discretion of the trial court. . . . [T]he district court considered a number of [the factors in 18 U.S.C. § 3582(c)], including Defendant's post-amendment guideline range, and decided that due to Defendant's personal and offense characteristics, Defendant did not merit a sentence reduction. After reviewing the record, we cannot say the district court abused its discretion.").
Outline at I.E and II.B.1.

Adjustments

ACCEPTANCE OF RESPONSIBILITY (§ 3E1.1(b))

U.S. v. Kimple, No. 92-10735 (9th Cir. June 24, 1994) (Nelson, J.) (Remanded: It was error to deny reduction under § 3E1.1(b)(2) on the grounds that over a year passed before defendant's guilty plea and he filed a pretrial motion to suppress evidence. "Because constitutionally protected conduct should not be considered against the defendant for purposes of an acceptance of responsibility reduction, . . . a defendant's exercise of those rights at the pretrial stage should not in and of itself preclude a reduction for timely acceptance. . . . If the Government establishes that it prepared for trial in conjunction with responding to pretrial motions, denial of the reduction may be justified. However, where the record reflects only the Government's efforts in responding to such motions, as [here], then the trial court may not deny the additional reduction for timely acceptance simply because a defendant vigorously defended a motion to suppress or simply because a given length of time has elapsed prior to the defendant noticing his intent to plead guilty. . . . [W]e do not consider the length of time that has passed in isolation," and here, in what the trial court called a complex case, there were several continuances, the government filed two superseding indictments, defendant's pretrial motions were not frivolous or filed for purposes of delay, and no trial date had been set.).

U.S. v. Stoops, No. 93-10244 (9th Cir. June 1, 1994) (Beezer, J.) (Remanded: Defendant's multiple confessions on day of robbery and leading police to evidence qualified him for the extra reduction under § 3E1.1(b)(1), despite the government's claim that these actions did not "assist[] authorities in the investigation or prosecution" of his offense because the information was readily available to police. "[S]ubsection (b) does not require that the defendant timely provide information that authorities would not otherwise discover or would discover only with difficulty; it requires merely that the defendant 'assist' the authorities by timely providing complete information or by timely notifying them of his intent to plead guilty. . . . Multiple consistent confessions on the day of arrest ordinarily serve such a purpose."

"The government also argues that Stoops does not qualify for . . . § 3E1.1(b) because Stoops challenged the admissibility of his confessions in pretrial motions to suppress[, reasoning] that a confession does not qualify a defendant for the reduction unless its admissibility goes unchallenged. This theory conflates subsections (b)(1) and (b)(2). These subsections are separated by the connective 'or,' not 'and.' A defendant qualifies under subsection (b)(1) if he timely provides complete information, whether or not he moves to suppress or timely notifies the government of his intent to plead guilty.

. . . Although the motions may have delayed his notice of intent to plead guilty, they could not have delayed his confessions, which had already occurred.").

U.S. v. McConaghy, 23 F.3d 351 (11th Cir. 1994) (per curiam) (Remanded: "Section 3E1.1(b)(2) is not facially unconstitutional." However, to avoid an unconstitutional *application* of § 3E1.1(b)(2), the district court must determine whether defendant's notification was timely in light of the circumstances, not simply whether the government had already engaged in trial preparation: "Avoiding trial preparation and the efficient allocation of the court's resources are descriptions of the desirable consequences and objectives of the guideline. They are not of themselves precise lines in the sand that solely determine whether notification was timely. . . . Application must bear in mind the extent of trial preparation, the burden on the court's ability to allocate its resources efficiently, and reasonable opportunity to defense counsel to properly investigate.").
Outline at III.E.5.

Departures

Mitigating Circumstances

U.S. v. Minicone, No. 93-1594 (2d Cir. June 8, 1994) (Miner, C.J.) (Remanded: "[W]e hold that where independent factors have been adequately considered by the Sentencing Commission and each factor considered individually fails to warrant a downward departure, the sentencing court may not aggregate the factors in an effort to justify a downward departure" under a "totality of circumstances" test.).
Outline at VI.C.3.

Criminal History

U.S. v. Rodriguez-Martinez, No. 91-10220 (9th Cir. June 1, 1994) (O'Scannlain, J.) (Remanded: In departing upward to 136 months for defendant subject to 120-month statutory minimum, the district court did not indicate how it calculated the departure above defendant's guideline range of 63–78 months and then above the mandatory minimum. The "existence of a mandatory minimum sentence does not alter the manner in which a district court determines the appropriate extent of a departure: a court must determine a defendant's offense level and appropriate criminal history category, including departures from the recommended criminal history category, just as it would in an ordinary case. If the resulting sentencing range is under the statutory minimum, the district court must give the mandatory minimum sentence; if the sentencing range includes the statutory minimum, the district court may impose a sentence above the mandatory minimum."). *But cf. U.S. v. Carpenter*, 963 F.2d 736, 745–46 (5th Cir. 1992) (affirming as reasonable under the circumstances departure to 230 months where district court used 180-month mandatory minimum sentence as starting point for departure calculation, rather than guideline range of 33–41 months).
Outline at VI.A.3.a.

U.S. v. Thomas, No. 93-5514 (6th Cir. May 23, 1994) (Merritt, C.J.) (Affirmed: Upward departure based on "inordinately high criminal history score of 43" was proper. "Thomas's score of 43, one of the highest we could find in reported cases, is clearly sufficiently unusual to warrant departure from the guidelines." The extent of departure was also proper even though the district court did not "consider and reject each of the six intermediate gridblocks between the original guideline range . . . and the range in which the actual sentence fell . . . ," as defendant argued it must do for departures above CHC VI. "Neither the Guidelines nor the law of this circuit require the district court to provide a mechanistic recitation of its rejection of the intervening, lower guideline ranges. Section 4A1.3 . . . indicates quite clearly that the court should continue to consider ranges 'until it finds' an appropriate sentence for the defendant before it, but nothing in § 4A1.3 calls for a more detailed, gridblock-by-gridblock approach advocated by the defendant. . . . The approach required of the sentencing court when departing beyond Criminal History Category VI, as we see it, is to consider carefully all of the facts and circumstances surrounding the case which affect the departure, and from them determine an appropriate sentence for the particular defendant.").
Outline at VI.A.4.

Determining the Sentence

Restitution

U.S. v. Meacham, No. 93-1692 (6th Cir. June 15, 1993) (Martin, J.) (Remanded: The Victim Witness and Protection Act "does not authorize a district court to order restitution for the government's costs of purchasing contraband while investigating a crime, even if the defendant explicitly agreed to such an order in a plea agreement. . . . While the Act provides that a 'court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement,' 18 U.S.C. § 3663(a)(3), this Court has held that the repayment of the cost of investigation is not 'restitution' within the meaning of the Act." *See Gall v. U.S.*, 21 F.3d 107, 111–12 (6th Cir. 1994) ("such investigative costs are not losses, but voluntary expenditures by the government for the procurement of evidence"; also holding that restitution imposed as a condition of supervised release is still subject to VWPA)). *But cf. U.S. v. Daddato*, 996 F.2d 903, 904–06 (7th Cir. 1993) (affirming "a condition in the nature of restitution on a sentence of supervised release" that defendant repay government's cost of purchasing drugs from defendant, including drugs from charges that were dismissed or never charged, reasoning that this payment is valid under supervised release statute's "catch-all provision," 18 U.S.C. § 3583(d), and not subject to VWPA).
Outline at V.D.2.

Violation of Supervised Release

Revocation for Drug Possession

U.S. v. Meeks, No. 93-1708 (2d Cir. June 2, 1994) (Kearse, J.) (Remanded: Defendant whose supervised release was revoked for drug possession should not have been sentenced under the mandatory provision of 18 U.S.C. § 3583(g) when his original offense occurred before that section's effective date (Dec. 31, 1988): "[A]ny provision for punishment for a violation of supervised release is an increased punishment for the underlying offense. Thus, where the underlying offense was committed prior to the effective date of § 3583(g), application of that section violates the Ex Post Facto Clause.").
Outline at VII.B.2.